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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-462

JOHN M. KING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOHN J. BARRETT, ESQ.
Attorney for Petitioner
26 Broadway
New York, New York
212-422-8180

MICHAEL F. ARMSTRONG
DAVID SIMON
WARREN H. COLODNER
26 Broadway
New York, New York
Of Counsel

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner John M. King, a defendant below, respectfully prays that a writ of certiorari issue to review the decision rendered by the United States Court of Appeals for the Second Circuit (Lumbard, Timbers and Davis, J.J.) on July 22, 1977, which affirmed a judgment of conviction entered after a trial before Frankel, J., and a jury in the United States District Court for the Southern District of New York for securities fraud, 15 U.S.C. §78j(b), mail fraud, 18 U.S.C. §1341, wire fraud, 18 U.S.C. §1343, and conspiracy to commit these offenses, 18 U.S.C. §371.

Opinions Below

The opinion of the Court of Appeals is set forth in Appendix A (1a-25a).

Jurisdiction

The judgment of the Court of Appeals was entered July 22, 1977. The Petitioner's request for a rehearing was denied on August 24, 1977.

The jurisdiction of this Court to review the judgment of the Court of Appeals is conferred by 28 U.S.C. §1254(1).

The Question Presented

In a prosecution under federal antifraud statutes, should the Government be allowed to introduce, over objection, evidence indicating that alleged victims suffered grave financial damage, while the defense is barred from responding that in reality those supposed victims benefited substantially? This Court has never ruled either on whether the prosecutor may introduce evidence of such damage or, if he may, whether the defense is forbidden to respond with proof of benefit.

Statutory and Constitutional Provisions Involved

The following statutory and constitutional provisions are involved: Amendments 5 and 6, U.S. Constitution; 15 U.S.C. §78(j)(b); 18 U.S.C. §1341; 18 U.S.C. §1343; 18 U.S.C. §371; Federal Rule of Evidence 403. The provisions thereof are set forth verbatim in Appendix B (26a-28a).

Statement of the Case

1. The Importance of the Question Presented

Over forty years ago, Judge Learned Hand indicated his doubts on the advisability of permitting the prosecution to prove financial damage to the victim of a securities fraud. *United States* v. *Brown*, 79 F.2d 321, 324 (2d Cir. 1935). He pointed out that such evidence "is extremely telling" before the jury, but that "it is difficult to see what

bearing it can have upon the crime" (79 F.2d at 324). Nevertheless, he decided, reluctantly, to allow the practice to continue "until the Supreme Court decides otherwise", and directed that such proof be limited to "evidence that the property bought turned out to be worthless, or that it greatly fell in value" (*id*).

The Supreme Court has yet to pass upon the practice thus criticized, which continues to be widely employed today. If the practice is to continue, this Court should make it clear that defendants have the right to respond with evidence that the supposed victim actually derived substantial financial benefit. Petitioner in this case was denied that opportunity.

In view of the breadth of federal antifraud statutes, and the widespread practice by the Government of proving financial damage in fraud cases, it is a matter of general concern that this Court define the defendant's right to meet and rebut such proof.

2. The Ruling Below

Petitioner King and his co-defendant were convicted of defrauding Fund of Funds, Inc. ("FOF"), an unrelated foreign mutual fund to which a King company in 1968-69 had sold large blocks of oil and gas interests in the Canadian Arctic. In December 1969, the King company helped its customer, FOF, sell a small portion of its Arctic holdings, for revaluation purposes, at a price which the Government claimed was artificially inflated by the Petitioner in bad faith. The sale was allegedly accomplished by means of undisclosed side arrangements, and the resulting value set for FOF's remaining Arctic holdings was claimed by the Government to be in excess of true value.

The Government was permitted, over objection, to put in proof for a strained but highly inflammatory argument that FOF and its shareholders had been victimized and financially damaged by the revaluation as well as by FOF's

initial purchases of its Arctic interests at allegedly excessive prices.

In fact, FOF and its shareholders benefited from the Arctic purchases, just as Petitioner had predicted at the time, because of continued successful development of the Canadian Arctic in the years after 1970. As a result of those later developments, it became clear that the Arctic interests purchased by FOF had a value many times greater than any of the prices which the Government had challenged as supposedly inflated. Petitioner was precluded, however, from presenting any such proof to the jury and, in affirming that ruling, the Second Circuit said (App. 22a):

> "If the case is seen in proper framework, it is beside the point that defendants had faith in the Arctic holdings in 1969-1970, that those assets had a good potential at that time, or that in the long run FOF and its shareholders benefited from their Arctic properties."

Petitioner respectfully contends that this ruling was in error.

3. Undisputed Facts

Commencing in 1967, King Resources Company, Inc. ("KRC"), a Denver-based publicly-held natural resource company of which Petitioner was Chairman of the Board and Chief Executive Officer, acquired interests in oil and gas permits relating to some 22 million net acres in the Canadian Arctic Islands. This represented the second largest position in the region, the first being held by a consortium managed by the Canadian Government. KRC's acquisition effectively preempted the area; thereafter none of the major oil companies could have acquired a significant interest except through KRC and its customers.

The presence of hydrocarbons in the Canadian Arctic has long been known, and in 1969-70 the region was the principal unexplored area in North America with the potential for major accumulations of oil and gas. During the

late 1960's, significant discoveries on the Alaskan North Slope had resulted in sales of explored acreage at prices in excess of $20,000 per acre. Development of the Canadian Arctic, which is at the opposite side of the Arctic Ocean from the North Slope, had to await, among other things, devising techniques for drilling under ice and the building of a pipeline. It was anticipated that commercial production in the area would not commence for at least a decade.

During 1968 and 1969, KRC sold about one-half of its undivided interest in the Canadian Arctic to FOF for approximately $1.00 per acre.

As an open-end mutual fund, FOF was required to revalue all its investments periodically in order to determine their market value. In the light of favorable developments in the Arctic in 1969, FOF decided that the value of its Arctic interests had increased far above the price at which they had been purchased from KRC, thereby necessitating a revaluation. FOF asked KRC to help in the revaluation by arranging arm's length sales for 10% of FOF's Arctic interests, which could be used as the bases for revaluing the remaining portion. KRC then arranged sales at a price of $15 per acre to two domestic buyers who were unrelated to KRC: Consolidated Oil and Gas Co., Inc. ("COG"), a publicly-heid oil and gas company, and John Mecom, a Texas oil multimillionaire. On the basis of those sales, FOF revalued upward its interests in the Canadian Arctic.

4. The Government's contentions as to value and damage

The Government's case was supposed to be limited to the question of whether the sales prices to COG and Mecom were artificially inflated. However, at trial, the Government made a whole series of contentions in support of its position that FOF and its shareholders had suffered massive injuries as a result of Petitioner's alleged fraud:

(i) The prosecutor began his opening remarks to the jury by describing the case as a "multimillion-dollar fraud"

which "victimized more than 100,000 shareholders of a mutual fund", whose savings had been "entrusted" to the defendants. Stressing the fact that most of the acreage sold was under water, and making sarcastic references to Petitioner's affirmations of its value, the prosecutor went on to claim that the revaluation "substantially affected every share and every shareholder . . . in that fund. . . ."

(ii) Throughout the trial the Government continued to insinuate, in a variety of ways, that FOF had been induced by Petitioner to invest in virtually worthless ice-covered Arctic waters.

(iii) The actual amount of damage most frequently alleged by the Government was $28 million.* In his summation, the prosecutor said that this "loss" was "a direct result of this particular fraud charged in this case." Invoking images of the "life's savings" of the "150,000 shareholders", the prosecutor charged that the defendants had inflicted "far more damage than a common thief with burglar's tools" and requested that the jury "just pretend that the spectators section is full of Fund of Funds shareholders and sitting out there are all the people who lost money as a result of what happened here. . . ."

(iv) By denigrating the value of the Canadian Arctic, the Government made it seem that no one — particularly sophisticated purchasers in the oil industry such as COG and Mecom — could conceivably have been willing to pay $15 per acre without secret inducements.

(v) In 1968-1970 Petitioner had made representations to FOF regarding the "future potential" of the Canadian Arctic, based on his then forecast that future developments

* At trial, it was shown that following the 1969 revaluation, $18 million in FOF shares were redeemed by shareholders and, unknown to defendants, a management fee of $10 million was paid to FOF's management company as a result of the revaluation. The Government claimed that these events somehow represented $28 million of financial losses to FOF and its shareholders. The benefits which enured to FOF from the true value of its Arctic investment were simply ignored.

would permit realization of the values he saw in that region and that FOF's Arctic interests could eventually be worth $3 billion. The Government presented evidence of these forecasts and estimates in a manner calculated to suggest to the jury that they were made in bad faith in order to conceal financial injuries being inflicted on FOF.

(vi) Quoting a side remark made during a KRC directors' meeting in 1971 by an absent witness whom the Government chose not to call, the Government vigorously argued to the jury that the revaluation price of $15 per acre was "ridiculous" and that this "ridiculous" price was "the issue in the case".

(vii) In his summation, the prosecutor capped a series of damage claims with the assertion that the assets of FOF's shareholders fell from $11 to $2 per share.* Admonishing the jury to "think about those shareholders . . . who didn't think the people running their fund would be defrauded by a man like John King", the prosecutor told the jury, "you may find differently". The Court of Appeals said that to the extent this Government claim of damage "may have been implicitly inaccurate", it was not "reversible error in itself" because it came in a "series of citations to other instances of damage to FOF and its shareholders . . . not susceptible to challenge as misleading" (App. 22a).** It is precisely because the Government was allowed

* This fall in value did not occur. The Government misleadingly referred to an FOF spin-off of assets (in the fall of 1970) to a newly-formed subsidiary, Global Natural Resources Prop. ("Global"), whose shares were then distributed to FOF shareholders. As stated by Government witness Alan Conwill, an FOF director, the redemption value of FOF shares and the over-the-counter price of the new Global stock, which the Government was seeking to compare, were in no way comparable for a whole variety of reasons. Global, as FOF's successor, still holds the Canadian Arctic properties originally purchased by FOF. Developments since 1970 confirmed that those properties are now of immense value to Global and to the FOF shareholders who received Global shares.

** These references were evidently to the $28 million referred to in fn. p. 6 above.

to put in such allegations of damage that Petitioner should have been allowed to respond by introducing proof of financial benefit.

(viii) The prices at which KRC sold various natural resource property interests to FOF, including the Arctic interests, were claimed to have been made at inordinate mark-ups, resulting in huge profits to KRC. Over objection, complex and confusing evidence on the extent of KRC's mark-ups on sales to FOF was introduced by the Government.*

The picture which emerged from the Government's version of events, which without effective rebuttal was seemingly incontrovertible, was clear to the jury: as a result of Petitioner's allegedly fraudulent revaluation sales in December 1969, FOF and its shareholders thereafter had seemingly suffered massive financial injury. As Judge Hand observed, this kind of telling proof can be very effective with a jury even though it may have little, if any, bearing on the crime (supra., pp. 2-3).** Such proof is particularly telling when defendants are effectively prevented from rebutting it.

5. The proof of developments in the years following 1970, which defendants were not allowed to introduce

The trial court would not permit the defense to introduce evidence of beneficial post-1970 developments in the Canadian Arctic. In the years following the 1969-70 reval-

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* Petitioner disputed the validity of the Government's mark-up evidence, which erroneously omitted substantial overhead and marketing costs.

** The key question of whether the Government's damage evidence was relevant was discussed by the Second Circuit only in regard to KRC's supposedly excessive mark up sales to FOF. These were found to bear on defendants' motive for making the revaluation sales. (App. 19a-20a). The Court made no such finding as to the other evidence of financial damage, all of which was clearly irrelevant.

uation, exploration activities in the Canadian Arctic made it increasingly clear that Petitioner was right in stating that FOF's interests there had enormous value. Over those years, as Petitioner had earlier forecasted: huge sums have been expended by investors in the search for oil and gas in that region pursuant to the program laid down by the Canadian Government; such efforts have resulted in the discovery of major reserves of natural gas; methods have been devised for drilling in areas of ice-covered water; plans are evolving for the construction of a pipeline from the Canadian Arctic; and there have been substantial increases in the market prices for oil and natural gas.

As a result of these developments, the 22 million acres invested in by FOF bear values today far in excess of the price originally paid by FOF or, for that matter, the higher price at which they were revalued in 1969. According to the most recent data, it appears that the interest purchased by FOF from KRC at $11 million is now worth billions of dollars, as Petitioner had predicted.* Far from being a "rip-off" artist who had wrongfully predicted impossible events (as pictured by the Government), Petitioner had made a reasonable and, indeed, conservative forecast of actual developments in the Canadian Arctic, as subsequent events confirmed. As a result, those shareholders who retained their interests have benefited enormously.

The jury, however, was never permitted to learn of events in the Arctic subsequent to 1970 tending to show that there had been no damage to FOF and that Petitioner's forecast was credible. The trial court ruled that any evidence of developments in the Canadian Arctic in the years

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* In recent litigation in Denver, COG has introduced geologic and engineering surveys showing that COG's undivided 1/32 interest, which it purchased in the 1969 revaluation sale for $5.2 million, has risen to $137.9 million. On that basis, FOF's 50% undivided interest, purchased at about $1 per acre, or a total of $11 million, is worth well over $2 billion.

after 1970 was irrelevant, and admonished counsel not to mention it to the jury.*

Petitioner and his codefendant took the stand and each reaffirmed his good faith belief in the value of the Arctic interests and in the views which had been expressed to FOF in 1968-70 concerning the Arctic properties sold by KRC to FOF. The court did not, however, allow them to tell the jury what had later happened in the Canadian Arctic. Absent any evidence that the forecasts had come true, the inference was inescapable that the forecasts had in fact not come true and that Petitioner and his co-defendant were not worthy of belief. The impact was devastating, not only to the defendants' credibility, but also to the credibility of COG's president, who also testified at trial to an absence of any secret inducements and his belief in the value of the Arctic.

Since the defense witnesses were not permitted to inform the jury of the successful outcome of the Arctic venture and the benefits conferred upon the supposed victims, the jury could only draw the conclusion that the defendants were confidence men who had previously ripped off FOF and, by their testimony, were now trying to rerun their confidence game for the benefit of a New York jury. After a complex six-week trial, the jury convicted Petitioner virtually without deliberating and without finding it necessary to review any testimony or a single document.

We submit that the Second Circuit's ruling which approved the withholding from the jury of information as to subsequent developments confirming the Arctic's actual

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* As the Second Circuit pointed out, "Appellants were not prevented from showing or arguing 1968-1970 value", but were precluded "from offering evidence on the current (1976) value" (App. 22a). The trial court made it clear throughout that value evidence after 1970 would not be received. A specific offer as to the latest evidence of value developed in 1976 was rejected; such evidence included studies and analyses of developments in earlier years.

value: (a) made it seem improbable that the valuation sales to Mecom and COG for $15 per acre could have been effected in good faith without secret inducements; (b) destroyed Petitioner's credibility as a witness; (c) eliminated evidence supporting the good faith of Petitioner's earlier forecasts of value; (d) destroyed the credibility of other defense witnesses who testified to similar forecasts and an absence of secret inducements; and (e) hamstrung the defense from meeting the Government's contentions of damage to FOF and its shareholders.

Reasons for Granting a Writ

This Court has never defined the limits, if any, on the Government's ability to introduce evidence of damage to alleged victims of fraud under Federal statutes. It is particularly important that some limit be set, in the light of the Government's increasingly aggressive interpretation of the scope of such antifraud statutes. It is respectfully submitted that, at the very least, the prosecutor must be controlled by an awareness that his contentions as to damages may open the door to countervailing proof by the defense.

Where the Government argues that supposed victims were harmed by the defendant's alleged fraud, proper administration of Federal antifraud statutes requires that the defendant be permitted to show the jury that no harm was intended or, in fact, done. It seems most unlikely, as a practical matter, that any jury would be willing to convict if it were to learn that the "victims" had actually benefited from the supposed fraud.

The Second Circuit concluded, despite the Government's claim that FOF had been victimized and damaged, that it was "beside the point . . . that in the long run FOF and its shareholders benefited from their Arctic properties." (App. 22a). The Court reasoned that, even if the

excluded evidence could have assisted Petitioner in demonstrating that he had "no need, motive or intent to concoct sham sales", the evidence of subsequent devlopments was "too remote and too far down the road" to compel the trial judge to admit it (App. 23a). The Court also hinted that subsequent developments in the Canadian Arctic were somehow disassociated from 1969-70, perhaps reflecting nothing more than the "effect of the Arab oil embargo" of late 1973 (App. 23a).*

The Court was in error in suggesting that Petitioner's proof of events subsequent to 1970 would have been remote and unrelated. In any event, the weight of such crucial evidence was a matter that should properly have been left for the jury, rather than the trial judge. The evidence would have shown that discoveries of accumulations of oil and gas continued to be made in the years following 1970, confirming KRC's findings in 1968 that the Canadian Arctic contained at least six huge geological structures with the potential for holding enormous quantities of oil and gas. With each discovery it became increasingly clear that production in the Canadian Arctic was economically feasible, exactly as Petitioner and COG had themselves forecast in 1968-70. Shortly before trial in 1976, still another confirmation was made of major oil and gas reserves located on FOF's own holdings.

It is a striking fact that the forecasts made by Petitioner and COG in 1968-70, as events transpired, correctly anticipated the favorable development of the Canadian Arctic on the basis of its geological reserves, the expected feasi-

* This suggestion by the Second Circuit that Canadian Arctic values after 1970 may have been merely a fortuitous and unforeseen result of the Arab oil embargo is not based on any evidence in the record. It is, we submit, contrary to fact. The world-wide shortage, which Petitioner predicted, made price increases inescapable, and the successful development of the Canadian Arctic, which was already well under way prior to 1974, was inevitable with or without the Arab oil embargo.

bility of drilling through ice and water, the economic feasibility of constructing a pipeline, and the higher prices which would result from an ever worsening world shortage of oil and gas. From 1971 through 1976 — and, indeed, in 1977 as well — the anticipated developments took place virtually as Petitioner and COG had forecasted, with resulting enormous benefits to FOF and its shareholders.

The jury was allowed to hear none of this because of "additional complexities, delay and possible confusion" (App. 23a). But it was the Government itself which had injected the complex and confusing issue of damage to FOF and its shareholders, over Petitioner's objection. Without proof to the jury that there was no damage, Petitioner was stripped of his defense.

1. *The excluded evidence was relevant to show lack of damage to FOF and lack of specific intent.*

Though not required to do so, the lower federal courts have permitted the Government in fraud prosecutions to introduce evidence of damage on the rationale that such evidence is probative on the issue of intent, an element of the offense the Government is required to prove. *Linden* v. *United States,* 254 F.2d 560, 566 (4th Cir. 1958). *See United States* v. *Regent Office Supply Co.,* 421 F. 2d 1174, 1180 (2d Cir. 1970); *Farrell* v. *United States,* 321 F. 2d 409, 419 (9th Cir. 1963), *cert. denied,* 375 U.S. 922 (1964); *but see* U.S. v. Brown, *supra,* 79 F.2d at 324 (L. Hand, J.).

Just as damage may indicate intent, lack of damage is probative as to the absence of intent and the immateriality of the alleged offense. Petitioner was precluded, however, from meeting the Government's allegations as to damage. Without the defense having any opportunity to apprise the jury of post-1970 developments confirming the Arctic's true value as forecasted by Petitioner, the Government's claim of damage and wrongful intent undoubtedly was given full credence by the jury.

It seems clear that the showing of damage necessarily affects the jury's judgment of the gravity of the offense and bears on the likelihood of conviction. In reality, unspoken matters such as these go to the heart of the jury's deliberations and the law has shaped itself to reflect this reality. Thus, where the Government alleges damage, elementary fairness entitles the defense to rebut it so as to avoid the otherwise appealing conclusion that the offense was a grave one deserving of vigorous punishment.

In *Worthington* v. *United States,* 64 F.2d 936 (7th Cir. 1933), a mail fraud prosecution for sale of valueless land, defendant was permitted to introduce evidence from satisfied customers which tended to refute the Government's claim of a fraudulent scheme. In *United States* v. *Matot,* 146 F.2d 197 (2d Cir. 1944) (L. Hand, J.), a conviction was reversed where evidence tending to show lack of damage and subsequent repayment, or offers of repayment, was excluded.

The same result should have governed here, where the excluded testimony would have tended to negate damage to FOF. Indeed, this case presents even stronger facts favoring admissibility than *Matot,* where the subsequent developments were brought about by the defendant himself and may have been calculated to serve as a defense. Here the evidence was objective and independent of defendants: the confirmation of the intrinsic value of the Arctic and the lack of any damage or intent was to be supplied by expert testimony as to geological data confirming the existence of oil and gas reserves, and the economic feasibility of extracting and transporting these reserves.

This evidence was vital to dispel the Government's assertions to the contrary and to support defendant's own testimony as to his intent. If Petitioner's belief — and, for that matter, the belief of COG and Mecom as well — in the

value of the Arctic could have been shown to have been bona fide and reasonably based, Petitioner's version of the mechanics of the Arctic sales, and particularly his lack of any specific intent to defraud, would have become credible to the jury.

2. *The evidence of Arctic values was also admissible in response to the Government's attacks on the reasonableness of the Arctic sales price.* Since the prosecutor was permitted to argue that this case was really about a "ridiculous" sales price of $15 per acre, developments confirming the value of the Arctic should have been admitted so that Petitioner could demonstrate that the $15 per acre price had been an extremely conservative estimate of the reasonable potential of the area. The willingness of COG and Mecom to assume the risks inherent in their purchase commitments without secret inducements would have been more understandable. Indeed, the valuation sales would look like bargains for COG and Mecom, rather than the fraudulent rip-off of FOF pictured by the Government.

The proffered evidence of Arctic developments was directly relevant to its value in 1969. *See* 3 Wigmore, *Evidence* § 717 n. 1 (Chadbourn rev. ed. 1970). The issue is the intrinsic value of the property and subsequent developments bearing on its capabilities are directly relevant on that issue. As this Court stated long ago, in executing the difficult task of "estimating the market value of land, everything which gives it intrinsic value is a proper element for consideration; not only its present use but its capabilities are to be considered." *Wetmore* v. *Rymer,* 169 U.S. 115, 129 (1898).

In a wide variety of circumstances the courts have not hesitated to consult subsequent developments so as to accurately assess an earlier market price for a particular

property. Thus, when the market value of a patent at an earlier time was in issue, this Court held it proper to admit evidence of the actual subsequent value of the patent. *Sinclair Refining Co.* v. *Jenkins Pet. Process. Co.*, 289 U.S. 689, 697-98 (1933) (Cardozo, J.). Similarly, when it became necessary to determine market value for certain public utilities property condemned by the Government the Second Circuit held that it had been reversible error to exclude evidence of subsequent developments, saying:

> "It would seem an eerie conclusion that a court must resort to guess, closing its eyes to reality, when its decision must actually be formulated after the true facts have become available. We think the evidence admissible not as a standard of value in itself, but for its bearing upon the prospective values at the time of taking." *United States* v. *Brooklyn Union Gas Co.*, 168 F.2d 391, 397 (2d Cir. 1948).

Evidence of subsequent value has also been admitted by courts faced with the necessity of determining market value in a variety of situations: *United States* v. *691.81 Acres of Land*, 443 F.2d 461 (6th Cir. 1971) (condemnation); *Dellefield* v. *Blockdel Realty Co.*, 128 F.2d 85, 97 (2d Cir. 1942) (action for fraud); *Groff* v. *Smith*, 34 F. Supp. 319, 323-24 (D. Conn. 1940) (tax assessment); *Kelsea* v. *Fletcher*, 48 N.H. 482 (1869) (contract); *Whiting* v. *Price*, 172 Mass. 240, 51 N.E. 1084 (1898) (Holmes, J.) (action for fraud); *cf. Hubbel* v. *Meigs*, 50 N.Y. 480, 491-92 (1872) (action for fraud).

Moreover, once the Government was permitted to place the value of the Canadian Arctic directly in issue, Petitioner was severely prejudiced by the denial of any opportunity to combat the Government's contentions with whatever probative evidence was available.

3. *The evidence of post-1970 developments was also admissible to rebut the insinuation that Petitioner misrepresented the "future potential" of the Arctic and other properties.* The prosecution also attempted to suggest that Petitioner had sought to "cover-up" his secret inducements by representing that the value of FOF's Arctic interests, in terms of their *future potential,* were materially understated as of July 1970. Statements to that effect made by the Petitioner were introduced by the Government during its direct case. Developments since 1970 make clear that Petitioner's representations of future potential were anything but fraudulent. They were absolutely true. Without an awareness of that fact by the jury, however, Petitioner's statements appeared incredible.

A sensible way of gauging the reasonableness of an earlier prediction is to examine subsequent developments. *See Richland* v. *Crandall*, 262 F. Supp. 538, 548n. 8 (S.D.N.Y. 1967). Although the district court in *Dabney* v. *Chase Nat'l Bank*, 98 F. Supp. 807 (S.D.N.Y. 1951), *aff'd in part, rev'd in part*, 196 F.2d 668 (2d Cir. 1952), *opinion supplemented*, 201 F.2d 635 (2d Cir.) *cert. dismissed*, 346 U.S. 863 (1953), did not rely upon such evidence, it approved of its use in circumstances similar to those in our case:

> "The plaintiff further argues that when one has recourse to prophecy to establish value, it may be shown by subsequent events that the prophecy was unreasonable when made. I believe that this is true if the subsequent events could reasonably be anticipated at the time of the appraisal. But then this would not be strict hindsight but rather would be an attack on the bases of the prophecy at the time it was made." (98 F. Supp. at 840).

The converse of this principle seems equally true: subsequent events which could reasonably be anticipated may bear out the reasonableness of a prophecy when made.

Whether the actual post-1970 Arctic developments could have been reasonably anticipated in 1970 — as in fact they were anticipated by Petitioner — was an issue for the jury, not the court, to decide.

Where, as in our case, the Government has suggested that Petitioner fraudulently misrepresented the "future potential" of the Canadian Arctic, Petitioner should have been able to respond with affirmative proof of developments confirming that potential.

4. *The trial court exacerbated the impact of the exclusion of evidence of the Arctic's true value by permitting the Government to argue that the Arctic sales price was "ridiculous".* As part of its efforts to convince the jury that FOF's Arctic interests were worth far less than $15 per acre, the Government made effective and repeated use of an off-the-cuff remark of a witness it had under subpoena but never produced. Near the close of a long KRC board meeting in January 1971 which had been called to discuss a dispute between KRC and COG (and at which Petitioner King was not present), Neil MacKenzie (who had not played any direct role in the Mecom or COG sales) offered his views on how KRC should respond to COG's ultimatum. At one point in his remarks, MacKenzie was interrupted and asked by someone whether the price COG had paid for its Arctic interest was too high. MacKenzie responded, without any further explanation, that the price was "ridiculous". He then continued with the points he had been trying to make before the interruption. No one at the meeting, including Petitioner's co-defendant, pursued this aside on COG's purchase price.

The Government argued, however, that because Petitioner's co-defendant had been present at the meeting when MacKenzie responded to the interjection and had made no response, the co-defendant, as a matter of law, had adopted

the truth of MacKenzie's comment, and that this permitted the Government to employ MacKenzie's remark against Petitioner as well.*

We respectfully submit that this ruling was erroneous and extremely prejudicial. As a result thereof, the prosecutor was permitted to argue in his summation that MacKenzie's characterization of the "ridiculous" nature of the valuation price of $15 per acre was *"the issue in this case"*. (Emphasis added). The Government's use of MacKenzie's offhand remark graphically illustrates the extent to which the value of the Canadian Arctic was made the real issue in this case as it was tried by the Government. By precluding Petitioner from proving that the Arctic interests were, in fact, extremely valuable and that FOF and its shareholders were not damaged by Petitioners, the issues of the Canadian Arctic's true value and damages to FOF and its shareholders were turned into one-way streets on which the Government, but not Petitioner, could travel. This deprived Petitioner of his constitutional right to a fair trial.

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* Under these circumstances, it would have been neither reasonable nor probable for the co-defendant to have responded to MacKenzie's criticism of COG's willingness to pay $15 per acre for its Arctic interest. *Wiedermann* v. *Walploe*, 2 Q.B. 534, 539 (1891), quoted in *United States* v. *Flecha*, 539 F.2d 874 at 877 (2d Cir. 1976). (Admissible statements limited to "circumstances which render it more reasonably probable that a man would answer the charge made against him then that he would not.") There was no charge at that time that COG had been given secret inducements, or that the co-defendant had done anything improper. See also, 4 J. Wigmore, *Evidence* § 1071 (Chadbourn ed. 1972). Moreover, the admission of MacKenzie's remark against the absent Petitioner denied him the constitutional right to confront the witness against him as applied by this Court in *Mancusi* v. *Stubbs*, 408 U.S. 204 (1972); *Bruton* v. *United States*, 391 U.S. 123 (1968).

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment of the Second Circuit.

Dated: New York, New York
September 23, 1977

Respectfully submitted,

JOHN J. BARRETT, ESQ.
26 Broadway
New York, New York
212-422-8180

Of Counsel:

MICHAEL F. ARMSTRONG
DAVID SIMON
WARREN H. COLODNER

APPENDIX A

Opinion in the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1061-2—September Term, 1976.

(Argued March 16, 1977 Decided July 22, 1977.)

Docket Nos. 76-1435, 76-1440

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN M. KING and A. ROWLAND BOUCHER,

Defendants-Appellants.

Before:

LUMBARD and TIMBERS, *Circuit Judges,*
and DAVIS, *Judge, Court of Claims.**

Appeals from judgments of conviction for securities fraud (15 U.S.C. § 78j(b)), mail fraud (18 U.S.C. § 1341)), wire fraud (18 U.S.C. § 1343) and conspiracy to commit those offenses (18 U.S.C. § 371), entered in the Southern District of New York, Marvin E. Frankel, *Judge,* after a jury trial.

Affirmed.

MICHAEL F. ARMSTRONG, New York, N.Y. (Warren H. Colodner and Barrett, Smith, Scha-

* Sitting by designation.

piro & Simon, New York, N.Y., on the brief), *for Defendant-Appellant King.*

ANDREW J. MALONEY, New York, N.Y. (Norman Arnoff and Maloney, Viviani & Higgins, New York, N.Y., on the brief), *for Defendant-Appellant Boucher.*

JOHN R. WING, Assistant United States Attorney, New York, N.Y. (Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, Paul Vizcarrondo, Jr., and Lawrence B. Pedowitz, Assistant United States Attorneys, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

DAVIS, *Judge:*

After a six-week trial in the Southern District of New York before Judge Frankel and a jury, appellants John M. King and A. Rowland Boucher were convicted on an indictment charging four counts:—one of securities fraud (15 U.S.C. § 78j(b)) and related counts of mail fraud (18 U.S.C. § 1341), wire fraud (18 U.S.C. § 1343), and conspiracy to commit those substantive offenses (18 U.S.C. § 371). King was sentenced to concurrent terms of one year's imprisonment on three of the counts, to be followed by three years of unsupervised probation on the mail fraud count. Boucher's sentence was to seven months concurrently on three counts, and thereafter also to three years unsupervised probation on the mail fraud charge.

Since appellants do not challenge the sufficiency of the evidence we do not set it out in detail; the barebones will suffice for the most part. The main institutional actors in the case were King Resource Co. (KRC), a Denver-based public company primarily engaged in selling oil, gas and

other natural resource interests, and the Fund of Funds (FOF), an open-ended Canadian mutual fund, Geneva-based, which was managed over-all through Investors Overseas Services (IOS), a Bernard Cornfeld company. King and Boucher were Chief Executive Officer and President, respectively, of KRC. In 1968 KRC (through King and Boucher) agreed with FOF to sell undivided interests in oil and other resource properties to FOF at a cost comparable to that charged KRC's other customers. During the next two years FOF because KRC's most significant customer, purchasing approximately $53,000,000 in such properties. The main holding involved in this case was a 50 percent undivided interest in some 22 million acres of oil and gas permits (with the potential of becoming leases) in the Canadian Arctic, bought by FOF from KRC for about $11 million.

FOF periodically revalued its investments in order to determine their "net asset value" (for the sale and redemption of its shares) and to pay IOS, the investment advisor, which was entitled to a commission on any appreciation of FOF's assets. One way in which this kind of revaluation was accomplished was by a sale of a small portion of the particular FOF asset. In 1969, after King and Boucher had advised FOF that the Canadian Arctic oil-and-gas holdings had substantially appreciated, FOF decided to revalue that property and asked King to arrange such sales (on FOF's behalf) of 10% of the FOF interest; it was understood that the sales had to be *bona fide* and arms-length so that they could be used to ascertain the correct market value of FOF's Arctic interests. Thereafter, at the end of 1969, sales were arranged by King and Boucher for about $15 an acre, more or less—sales which appeared on their surface to be genuine. On the basis of these sales FOF's Arctic holdings were revalued very sharply upwards.

The core of the prosecution's case was that these sales, which seemed to be *bona fide* and arm's length, and were so represented by appellants, were collusive transactions in which appellants arranged to supply the purchasers with the funds to buy the property and also agreed to buy the permits back if the purported vendees so wished. The two sales on which the case centered and which the court's charge presented to the jury were one to John Mecom and another to Consolidated Oil and Gas Co. (COG).

For the Mecom sale—as to which the prosecution's proof was stronger—the Government's evidence supported the following indicators that the transaction was not a genuine one on which a proper revaluation of FOF's Arctic properties could be grounded (we use the summary which the court's charge gave the jury of the Government's contentions on this point):

(1) That Mecom would be assured of net cash receipts from business with KRC or with King-related companies in the form of drilling work in the Arctic or elsewhere sufficient to supply him with profits for the payments called for under his contract for that purchase of the FOF interests.

(2) That Mecom would be advanced by KRC or a King-related company the money needed to make the down payment of something in excess of $260,000.

(3) That Mecom would not be obliged to pay any money out of his own pocket other than moneys advanced to him by KRC or obtained by him from KRC to King-related companies.

(4) That King or a King-related company would at Mecom's request buy back the Arctic interests and hold

Mecom harmless from any obligation to make the payments that purported to be due under the sales agreement.[1]

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1 In greater detail, the prosecution's proof showed the following for the Mecom sale:

Late in 1969 King approached Mecom through Hulsey, a friend of Mecom's and a KRC employee. Hulsey testified that King told him to offer Mecom a buy-back arrangement for a sale of the Arctic interests but that Mecom was hesitant because of lack of liquid funds. Hulsey stated that in late December 1969 Boucher sent him to Houston with a sales contract for Mecom and explained that an additional agreement would be arranged later and would provide for a "repurchase agreement" and an "agreement to provide work." Hulsey told Marriott, Mecom's attorney, that Mecom would not have any personal liability, that payments under the sales contract would be made from profits earned by KRC employing Mecom's drilling rigs, and that if Mecom was unsatisfied, King would buy the interests back. The sales contract provided that Mecom was to pay $7.50 per acre cash plus an additional $7.50 per acre in work obligations for 347,883 acres (about 3 per cent of FOF's holdings). Mecom and Marriott did not want to sign the contract because it was a straight sales agreement, and did not contain Hulsey's guarantees. It was then agreed that Mecom would sign but that Hulsey would not release the contract until Marriott received a supplemental agreement incorporating Hulsey's promises. Hulsey testified that he then returned to Denver and that the contract was removed from his desk and was given to Boucher's secretary.

Lowry, KRC's general counsel, testified that after speaking with King, he prepared a letter agreement, an unsigned copy of which was sent to Marriott along with a note indicating that Lowry would retain the original, which had been signed by King. Lowry stated that he destroyed the original in January 1972, when his offices were moved. What was apparently Marriott's copy and the accompanying Lowry note were produced at the trial. The letter confirmed the sales contract, promised to provide sufficient payments to be made to Mecom to meet all payments on the sales contract through October 1971, and further provided that King would accept an assignment of Mecom's liabilities and interests under the sales contract any time between October and December 31, 1971.

Mecom's downpayment on the sales contract, approximately $260,000, was due on January 2, 1970. Boucher and Hulsey arranged, with King's authorization, to forward $275,000 to Mecom through a Colorado Corp. subsidiary (Colorado Corp. was a King-controlled company). On January 22, 1970 Marriott received a check for $275,000 and arranged for the proceeds to be used to cover the $260,000 downpayment. Appellants claim this money was an advance on an arrangement to use one of Mecom's drilling rigs. Mecom never received any drilling contracts from KRC (apparently because his equipment was unsuitable or unready).

Capping the fraud, in the Government's presentation, were 1970 letters to FOF's auditors, signed by both appellants, representing that the Mecom and COG sales were both arm's length and *bona fide,* that no buy-back agreements were involved, or any guarantee to the purchasers of the economic results of the transactions. These letters were written prior to FOF's revaluation of the property and as part of that process.

Defendants, who took the stand, denied that any of the arrangements they entered into with Mecom or COG was underhanded or lacking in full good faith, denied that there were any buy-back agreements integral to the sales as made, and asserted that any arrangements by which money was supplied to Mecom (or to COG) were pursuant to independent and legitimate business transactions, not designed as secret inducements or side-deals in connection with the Arctic purchases by Mecom or COG. They maintained that the representation letters to FOF's auditors were not fraudulent but accurate characterizations of the Mecom and COG transactions.

Though appellants do not argue sufficiency, they insist that the prosecution's case was very thin, and that we must bear that in mind in appraising the various trial and evidentiary points urged upon us. Judge Frankel, on the other hand, writing on the defendant's post-trial motions, pointed out that "the jury's deliberations were notably swift. It seemed evident that the evidence for conviction was clear and overwhelmingly persuasive." He also found "the proof of guilt powerful to the point of near certainty," that "the court is convinced beyond a reasonable doubt, as the jury must have been to convict, that the defendants swore falsely at key junctures in their testimony," and that "the testimony of some 49 witnesses and the large volume of exhibits appear convincingly to justify as reliable and accurate the conclusions the jury declared it had reached beyond a reasonable doubt."

From the record as well as the written and oral presentations made to us, we have no reason to disagree with the trial judge's view that the Government's case was strong. It was based, in large part, on the direct testimony of participants in the relevant transactions plus some telling documenatry materials—to which was added the cement of common sense and human experience. It is in this light that we must evaluate the contentions for reversal which we now take up. *See United States* v. *Ong,* 541 F.2d 331, 334 (2d Cir. 1976).

The Mecom Bankruptcy Documents

John Mecom was, as we have said, the purchaser in one of the two revaluation sales the Government challenged as lacking in *bona fides.* Some months after that transaction he went into bankruptcy. As a Government witness, Mecom testified that he did not have the money to buy the Arctic interest to be sold to him but that King (or a King company) would supply the cash through a business deal, and would also buy back the property later on if Mecom wished. At the close of his cross-examination by King's counsel, the latter offered more than 200 pages of official documents relating to Mecom's bankruptcy. The stated purpose of the offer was to show that "there are representations made in these bankruptcy papers as to the Arctic contract, in which it is treated in the bankruptcy papers as a legitimate, binding contract, with no mention of any side agreements or anything having to do with any side agreements, up to a certain point in the bankruptcy, where the further papers show that there was a contest made for the first time where the contract was challenged, but not on the grounds that have been testified about in

these proceedings." However, no specific parts of the bundle were pointed out to court or jury as inconsistent with Mecom's testimony—but it was and is clear that only a relatively small number of excerpts bore at all on those subjects. Nevertheless, the whole "sheaf of papers" was then summarily received. Without any further substantial cross-examination of Mecom on the documents, counsel concluded cross-examination.

On redirect the prosecutor elicited from Mecom that he had prepared none of the 10 exhibits, that the papers had been prepared by his attorneys and accountants and he was generally ignorant of their contents, and that only three exhibits contained documents bearing his signature. Based on this redirect, the Government then moved to exclude the documents. Defense counsel responded with a voir dire bringing out that Mecom had apparently read the documents he signed and that where a contractual liability was disputable his lawyers would discuss the matter with him. Again, no specific parts of the exhibits were segregated out as inconsistent with Mecom's testimony; counsel did say, however, that he would be willing to excerpt the relevant portions and make a sub-exhibit. The court then granted the prosecution's motion to exclude, primarily on the ground that defendants had not yet indicated the claimed inconsistencies and had not sought to use the allegedly pertinent portions in cross-examination. A short while later, defense counsel again attempted to have the documents admitted; he explained that his intention had been to read to the jury the specific portions said to be inconsistent with Mecom's testimony but that he now realized that he should have brought out more from Mecom, and that at this point he merely wanted to go through certain of the documents with the witness, especially the signed ones, in order to bring out that the Arctic contract was

listed in the bankruptcy proceedings without any question or reservation. In this connection counsel said: "I did not feel that I wanted to question the witness at great length about something that was obviously prepared by his attorneys but he swore to it. I was not going to make any big point about the fact that he prepared it or sweated over it." Emphasizing that the defense had twice foregone the opportunity to point out the alleged inconsistencies, to explain the relevance of this mass of official documents, and to connect Mecom with those contradictions, and noting that "even as you put it now at most these [papers] are of modest potential relevance in this case," the court adhered to its ruling of exclusion.

On this appeal, appellants have blown up this exclusion as a major error affecting their opportunity to break down the Government's case. We do not so see it. The defense has now suggested all kinds of uses to which these bankruptcy documents could have been put at the trial (including extensive cross-examination of Mecom on various scores) but the record is clear that (a) the only purpose suggested for the admission of the papers was that they incorporated prior inconsistent statements of Mecom; (b) appellants' counsel never got down to singling out for the court or jury the particular portions of the documentary packet on which he relied for this purpose; (c) counsel twice refrained from cross-examining Mecom as to these inconsistencies when he had the chance; (d) even at the end of the effort to get the papers admitted, counsel obviously did not wish to cross-examine Mecom extensively or thoroughly on the basis of the papers but primarily wanted to read portions to the jury with only the lightest of explanation from Mecom; and (e) the record, as the defense left it, showed that Mecom's personal connection with the bankruptcy documents, to the extent there was any at all, was far from deep.

In these circumstances Judge Frankel was within his discretion to exclude the evidence. Counsel was very tardy in offering to point out and segregate the few relevant portions of the large file. *See Trade Development Bank* v. *Continental Ins. Co.*, 469 F.2d 35, 44 (2d Cir. 1972). Even then, the plan was to read selected excerpts to the jury without drawing from Mecom any substantial background for or explanation of the asserted contradictions. Judge Frankel was surely right in referring to the "modest potential relevance" of the alleged inconsistencies since there were several reasons why Mecom and his lawyer-and-accountant aides might not wish to mention the side-agreements with appellants in the bankruptcy papers. FED. R. EVID. 403 authorizes a trial judge to exclude even relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury • • •." In view of the official nature of the documents (the judge referred to "red seals and ribbons") with their possible untoward effect on the jury, the prolonged failure to pinpoint the small portions which were at all pertinent, counsel's refusal to explore the relationship between the submission of the papers to the bankruptcy court and Mecom's testimony in this case,[2] and the minor probative force of the evidence, the exercise of discretion under Rule 403 was available and could properly be used.

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2 Under Rule 613 of the Federal Rules of Evidence, dealing with the admissibility of extrinsic evidence of a witness's prior inconsistent statement, the defense was not itself required to confront the witness with the statement or to give him an opportunity on cross-examination to explain—so long as the witness was afforded in some fashion an opportunity to explain or deny. However, that does not mean that in this instance the defense was not called upon to explore the matter further with Mecom in order to avoid exclusion under Rule 403 for "unfair prejudice, confusion of the issues, or misleading the jury." Rule 613 and Rule 403 fulfill separate functions. Although admissible under 613 the papers could be excluded under 403.

In any event, three of the excluded bankruptcy documents were later admitted, one of which defense counsel's summation put to the jury as demonstrating the very inconsistency he had stressed in trying to have the documents admitted during Mecom's testimony. If the subexhibit (containing the alleged inconsistencies) which counsel belatedly asked leave to submit had been accepted, the defense would not have been in a materially better position since, as we have stated, the course counsel wished to follow was to read and argue from the bankruptcy documents in just this fashion. We find no support for the strained argument that the court's prior handling of the problem of the bankruptcy papers so prejudiced the jury that any defense argument in summation (based on the documents) could not be effective.

Pre-indictment Delay

The indictment was brought in January 1975, towards the end of the limitations period but within it. Appellants claim, under *United States* v. *Marion*, 404 U.S. 307, 324-25 (1971), that they were deprived of due process by the delay between the occurrence of the alleged criminal acts and the beginning of the case. This issue was twice considered by the District Court, once before trial and, again, after trial. On the basis of extensive affidavits and documentation, Judge Frankel decided each time that there was insufficient merit in the point. In his post-trial ruling he concluded that "defendants show neither intentional delay for tactical advantage nor measurable prejudice • • •." Appellants suggest no adequate ground for overturning this considered determination.

A recent Supreme Court decision has clarified the principles underlying a finding that a pre-indictment delay violates the Due Process Clause. *United States* v. *Lovasco*.

U.S. Sup. Ct. No. 75-1844, decided June 9, 1977, 45 U.S. L.W. 4627. The Court first ruled that "proof of prejudice is generally a necessary but not sufficient element of a due process claim, and that the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused" (45 U.S.L.W. at 4629); then held that the prosecutor does not go against due process by refusing to seek indictments "until he is completely satisfied that he should prosecute and will be able promptly to establish guilt beyond a reasonable doubt" (45 U.S.L.W. at 4630); and concluded that "to prosecute a defendant following investigative delay does not deprive him of due process, even if his defense might have been somewhat prejudiced by the lapse of time" (45 U.S.L.W. at 4630-31). The Court indicated, however, as it had in *Marion*, that a "tactical" delay by the prosecution would violate the Constitution and implied that the same could well be true for a reckless disregard of the defendant's rights (45 U.S.L.W. at 4630, fn. 17).

Appellants' contention is that, as early as 1971-72, the Securities and Exchange Commission had enough facts to warrant a further investigation and a speedier indictment. It may well be that in those years the S.E.C. received information giving it probable cause to believe that both the Mecom and COG transactions were suspect, incorporating secret buy-back agreements.[3] But *Lovasco*, *supra*, explicitly teaches that prosecution need not, should not, follow where the Government merely has probable cause. It was not until July 1973 (after an attorney for FOF's successor went directly to the S.E.C. Director of Enforcement) that the S.E.C. initiated a full formal investigation into the Arctic deals (with one investigator). Meanwhile, the Den-

3 However, the S.E.C. did not then have adequate information as to appellants' representations in 1970-1971 to FOF's auditors.

ver office of the agency was heavily involved in investigating other of appellants' transactions of which it had earlier learned, but the S.E.C. cannot be faulted, in view of the limitations on its budget and staff, for concentrating on those other aspects, especially since the Arctic information available to it, though suggestive, was by no means conclusive. Similarly, the United States Attorney's Office in Denver was centering on these other phases of appellants' activity. At the very least, we find no basis whatever for thinking that the S.E.C.'s delay in starting to investigate the Arctic transactions, or the Department of Justice's judgment regarding priorities during this earlier period, was "tactical," intended to deprive the appellants of their rights of defense, or reckless of those rights. After the formal investigation began in the summer of 1973, an extensive inquiry was had, involving more than 80 interviewees and thousands of documents. The case was referred to the Department of Justice for possible prosecution in September 1974, and considering the complexity of the matter the indictment was promptly returned in January 1975.

The upshot is that, in our view, the period since July 1973 certainly fell within the type of "investigative delay" which *Lovasco* held not to deprive an accused of due process.[4] The prior time from 1971 to the middle of 1973, though not taken up with investigation focused on the Arctic, should likewise not be counted against the Government. During that period the federal agencies (S.E.C. and the Justice Department) plainly did not have nearly enough evidence to prove guilt beyond a reasonable doubt; they were not required to divert their energies from the

4 The Court held in *Lovasco* that a prosecutor could delay, even after he had developed the minimum evidence to prove guilt beyond a reasonable doubt, so long as he was continuing his investigation in good faith to firm up his case.

other inquiries to delving into appellants' Arctic transactions; and they were neither attempting "to gain tactical advantage over the accused," *United States* v. *Marion, supra,* 404 U.S. at 324, nor knowingly reckless of the risks to appellants in delaying prosecution. No plausible reason has been given us why the Government would have, or had, any purpose in 1971-1973 other than to concentrate on the separate investigations (into appellants and KRC) which at the time seemed to it much more likely to reveal provable wrongdoing; there is no substantial indication that placing the Arctic transactions "on hold" for that period was designed to injure appellants or harm their defense. When FOF's successor management brought the matter forward again in 1973, the S.E.C. stepped up its interest and the formal investigation began and proceeded in due course.

The other facet of appellant's presentation on this point is that they were substantially prejudiced by the lapse of time. As we have pointed out, *Lovasco* countenances some prejudice due to *bona fide* investigative delay. Judge Frankel said, after the trial, that he had "a definite conviction that defendants were not injured to any material extent by the lapse of time." Giving weight to this appraisal by the trial judge, we too find that any delay-prejudice appellants may have suffered did not deprive them of due process. They stress the death in June 1974 of Edward Cowett,[5] a high functionary of FOF, but are basically unable to say with any specificity or assurance what he would have said on the stand or how his testimony would have aided their case. We see no reason to believe that his testimony, if he were called, would have helped appellants. Cowett had, as far as the record re-

5 *Lovasco*, which held that no due process violation had been shown, involved the death (during the pre-indictment delay) of two persons said by the accused to be material witnesses for him.

veals, nothing to do with any side-arrangements between appellants and Mecom or COG. On that, the heart of the case, he could have added little or nothing. Although there are materials suggesting the contrary, he may conceivably have known and approved the profits KRC generally made on its continuing sales of property to FOF, but if that were the corporate view of FOF appellants could and should have called Bernard Cornfeld, or other officers or directors of FOF, to show it.[6]

Another claim of prejudice is through the absence of two documents destroyed in ordinary course during the pre-indictment period. One was the original of the written buy-back letter agreement with Mecom (which had been retained by King's lawyer and later disposed of as no longer in effect), there being produced at the trial only unsigned copies which appellants challenged as inaccurate and never seen or authorized by King. Their main position is that if the original was also unsigned it would have tended to corroborate their contention that such a secret pact was never put into effect. This may possibly be so but we think that, against the weight of oral and written evidence showing that King actually made such a side buy-back agreement, the loss of this original was too slight and too conjectural a prejudice to warrant dismissal of the indictment for delay for which the Government cannot properly be faulted under *Marion* and *Lovasco*. Also lost were the notes taken at the time by a newspaper reporter of a conversation with a high officer of COG in which the latter declared that he had a buy-back arrangement with KRC. This loss seems insignificant since the reporter's

6 Cowett's evidence was not wholly lost because his 1970 grand jury testimony—given in another connection but including a part of the general relationship between KRC and FOF—was read to the jury at appellants' request.

story was published the next day, and he was available at the trial for full cross-examination.

We have also considered the other instances of claimed prejudice, all of which were discussed extensively by both parties in the presentations made to the court below and here again, and again we find them too speculative, too peripheral, and too slight to call for dismissal. We mention only (a) the assertion of diminished recollection, a type of general prejudice which this court has already rejected, *United States* v. *Finkelstein*, 526 F.2d 517, 526 (2d Cir. 1975), *cert. denied, sub nom. Scardino* v. *United States*, 425 U.S. 960 (1976); *United States* v. *Payden*, 536 F.2d 541, 544 (2d Cir. 1976) and (b) appellants' claimed lessened ability to assemble evidence from the KRC files, a general allegation unsupported by a showing of what such documents could be or why they were not subject to subpoena. The result is that, on the whole case, appellants have failed to show such substantial prejudice, considering that the Government was not at fault in the delay, as to require dismissal of the indictment.[7]

Immunization Because of Bankruptcy Testimony

Appellants both urge that the prosecution improperly used bankruptcy testimony given by them under a statutory grant of immunity—King during his personal bankruptcy proceedings in 1971 and 1973, Boucher, in 1971 and 1973, with respect to KRC's reorganization. This point

7 This court has upheld several convictions with comparably lengthy pre-indictment delays. *See United States* v. *Schwartz*, 535 F.2d 160 (1976); *United States* v. *Eucker*, 532 F.2d 249, 255 (1976), *cert. denied sub nom. Anderson* v. *United States*, 429 U.S. 827 (1976); *United States* v. *Ferrara*, 458 F.2d 868, 875, *cert. denied*, 408 U.S. 931 (1972); *United States* v. *Iannelli*, 461 F.2d 483, 485, *cert. denied*, 409 U.S. 980 (1972); *United States* v. *Feinberg*, 383 F.2d 60 (1967), *cert. denied*, 380 U.S. 1044 (1968).

was likewise gone into twice by the trial judge, before trial in written submissions (including affidavits) and after trial by further extended written presentations and an oral hearing. The gist of the Government's response was that only the S.E.C. attorney-investigator, not the United States Attorney's staff, had looked at this bankruptcy evidence and then only at some of it—and that there were independent sources for all the Government's material used to obtain the indictment or offered at the trial. Judge Frankel found post-trial, "a totally convincing demonstration by the prosecution that there was no use or derived use of the kind defendants posit. Clear, specific and credible accounts are given to display the untainted sources of the Government's witnesses and other evidence. Cross-examination [of the S.E.C. attorney] has not served to impair the persuasive showing made by the Government on this subject." The judge assumed that the prosecution has a heavy burden to disprove taint and held that burden met.

We have no reason, after reviewing the record, to question the court's conclusion. The investigation below into possible taint was thorough and exhaustive, there is no claim that the Government failed to make full disclosure, the appellants had a full and fair opportunity to break down the Government's showing but failed to make a significant dent.[8] Because the prosecution already had independent sources for its full case, Boucher is wrong in claiming taint merely because the S.E.C. attorney, after the indictment in order to see what kind of witness this appellant would make, read Boucher's 1971 bankruptcy testi-

8 King says that the Government should have had transcribed certain of his bankruptcy testimony which was left untranscribed. Aside from his lateness in making this request, it was his obligation, which he did not fulfill, to show that prima facie the untranscribed testimony concerned matters related to the prosecution. *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972).

mony (*see United States* v. *Bianco*, 534 F.2d 501, 514 n.14 (2d Cir.), *cert. denied*, 429 U.S. 822 (Oct. 5, 1976)). The same is true of the Government's mere possession somewhere in its files of Boucher's 1973 bankruptcy testimony.[9]

Refusals to Charge

Boucher says that the court erred in refusing to charge his defense that he relied on counsel in signing the representation letters to FOF's auditors. There are multiple defects in this claim. Boucher's position throughout the trial was that he knew nothing of any side-deals or buy-back arrangements with either Mecom or COG; it is very hard to see how in those circumstances a defense of reliance-on-counsel, which goes to unlawful intent not knowledge of the facts, could have any relevance. *See, e.g., Powell* v. *United States*, 513 F.2d 1249, 1251 (8th Cir.), *cert. denied*, 423 U.S. 853 (1975). Second, Boucher specifically testified on cross-examination that he did not recall relying on counsel before signing the representation letters; thus, there was no factual predicate for the requested instruction. Third, there was no showing that before he relied on counsel, if he did, he gave the lawyer all the relevant facts as to the Arctic transactions. *See Bisno* v. *United States*, 299 F.2d 711, 720 (9th Cir. 1961), *cert. denied*, 370 U.S. 952 (1962). Lastly, significant representations were made as to specific facts (*e.g.* that there were no buy-back agreements) and as to those we cannot understand how a businessman who knows that such factual representations are untrue can screen himself by trying to

9 Because we find no taint with respect to any of the evidence used by the prosecution, we need not consider the point that Boucher's 1973 testimony under Section 167 of the Bankruptcy Act, 11 U.S.C. § 567, did not grant him immunity.

rely on advice of counsel. *See Williamson* v. *United States*, 207 U.S. 425, 453 (1908).[10]

The only other attack respecting the charge is the refusal of the court to tell the jury that "if you do not fully understand the nature of the proof or the charges against either defendant, then you must acquit the defendant". In this case, with its components of financial and technical proof, much of it peripheral to the core issue of the Mecom and COG transactions, a sweeping charge of that kind was obviously inappropriate. The court gave unexceptionable instructions on reasonable doubt and burden of proof, and rightly centered its instruction on the paramount question of the *bona fides* of the Mecom and COG sales. The jury received the necessary guidance from the court to help it separate out the wheat.

Admission of Evidence as to the Profitability of KRC's Business with FOF and of Loss to FOF from the Mecom and COG Transactions

The Government spent some time putting in evidence—through an S.E.C. accountant and a number of charts drawn from the books and records of KRC and King-related companies—of the profitability of KRC's business of selling undivided interests in natural resource properties to FOF.[11] Since appellants did not make any direct profit from the revaluation sales to Mecom and COG, the Government wanted to show the appellants' motive for arranging those tainted transactions. That motive, as the prosecution presented it, was to enable KRC to demonstrate to FOF that the former's continuing project of sell-

10 It is noteworthy that, although no charge was given on the point, defense counsel suggested the defense in his summation.

11 Including the profits from the business of Colorado Corporation, a King-controlled (and mostly King-owned) company.

ing properties to FOF was to the latter's financial advantage, thereby inducing FOF to prolong its program of purchasing from KRC (which was to KRC's great benefit).

It is in the trial judge's discretion to admit evidence suggesting the defendants' motive for the crime charged. *Moore* v. *United States,* 150 U.S. 57, 60-61 (1893); *United States* v. *Fernandez,* 497 F.2d 730, 735-36 (9th Cir. 1974), *cert. denied,* 420 U.S. 990 (1975). The evidence objected to was carefully limited by the court to the question of motive for the allegedly sham sales to Mecom and COG, and the jury was instructed not to consider it as showing that KRC fraudulently overpriced its own sales to FOF. Appellants insist that nevertheless the evidence was highly prejudicial because it led the jury to consider them "bad men" who simply ought to be punished for milking FOF through high prices. We cannot accept this complaint. The information was highly relevant to the case; it explained why appellants would do what they were said to have done. The prosecutor's summation stressed KRC's financial interest but he tied it directly to the Mecom and COG sales as showing the motive why they were planned. Above all, the court kept the jury on the track in its instructions, in a specific direction as this evidence came in, as well as in the final charge. We do not think the jury was permitted to avoid confronting the summit issue of the Mecom and COG sales by sliding down the tempting slope that appellants were conviction-worthy simply because they were financial highbinders.

Appellants also say that the Government's presentation on this point was both excessive and inaccurate. Neither the time taken (half-a-day in a six-week trial) nor the amount of the evidence was immoderate, especially since appellants had refused (despite the judge's urging) to stipulate to sales and gross profits figures, and their summary concession of the profitability to KRC of the

FOF business came out subsequently in defendants' case (through the testimony of King). The claimed inaccuracy is that the Government's evidence, using gross profit figures, failed to take account of substantial indirect costs of KRC. The presentation followed the way in which KRC and Colorado Corporation kept their books, and appellants had full opportunity to challenge the correctness of the prosecution's calculations and to offer their own. *See United States* v. *Kyle,* 257 F.2d 559, 563-64 (2d Cir. 1958), *cert. denied,* 358 U.S. 937 (1959). The judge was not required to exclude the Government's evidence, based as it was on the books of KRC and KRC-related companies, because the defendants disputed that it accurately reflected the amount of KRC's and appellants' gain.

In the same vein, defendants challenge certain proof used by the prosecution to tell the jury that shareholders of FOF suffered a loss as a result of the fraudulent revaluation of the Arctic properties. There was evidence that in 1970 FOF faced a liquidity crisis because of the combination of the fact that a large percentage of its assets were the illiquid natural resource properties sold it by KRC and Colorado Corporation, together with the fact that large numbers of FOF shareholders redeemed their shares to take advantage of the increased valuation. To alleviate the situation FOF spun off the natural resource properties to a new closed company called Global. In summation the prosecutor pointed out that before the spin-off FOF's natural resources accounted for about $11 worth of each FOF share, but afterwards Global shares sold only for $2 to $3. This comparison, it is said, led the jury to think mistakenly that the $2-3 price was all the Arctic properties were actually worth at the time, far less than the revalued figure obtained through the *mala fide* Mecom and COG sales. The prosecutor's short reference to the Global spin-off was probably too cryptic but it came in a

series of citations to other instances of damage to FOF and its shareholders, damage not susceptible to challenge as misleading; we think that the spin-off remark, to the extent it may have been implicitly inaccurate, was not so injurious or so important as to be reversible error in itself.

Exclusion of Evidence as to the 1976 Value of the Arctic Interests

The trial court precluded appellants from offering evidence on the current (1976) value of the KRC-FOF Arctic holdings. This is tagged as error because, defendants say, (a) proof of the high present value would have confirmed their belief in the properties in 1969-1970 and would have demonstrated their lack of intent to defraud, (b) proof of 1976 value goes toward showing 1969-1970 value,[12] and (c) present value demonstrates that appellants did not misrepresent in urging FOF to revalue its Arctic interests upward.

It may be that 1976 value would have some slender and marginal utility in firming up some of these propositions but Judge Frankel could properly exclude it because the complexity and delay which would be injected would far outweigh any contribution toward proving a proposition important to appellants' defense. *See* FED. R. EVID. 403; *United States* v. *Corr*, 543 F.2d 1042, 1051 (2d Cir. 1976). If the case is seen in proper framework, it is beside the point that defendants had faith in the Arctic holdings in 1969-1970, that those assets had a good potential at that time, or that in the long run FOF and its shareholders benefited from their Arctic properties. The basic accusation was that appellants knowingly misrepresented in 1969-1970 that the sales to Mecom and COG were arms-length,

12 Appellants were not prevented from showing or arguing 1968-1970 value.

including no buy-back side-deals, so as to induce FOF to revalue upward its Arctic assets. As we have stressed, the case went to the jurors under instructions expressly directing them to Mecom-COG as the focus of the fraud charged against appellants. That accusation poses an issue entirely separate from the actual value of the Arctic properties in 1969-1970, and theoretically the value of the properties in those years would not be directly pertinent. But even if one assumes that proof of 1969-1970 worth could help appellants to demonstrate that at that time they had no need, motive, or intent to concoct sham sales, disputable evidence of 1976 value is too remote and too far down the road to compel the trial judge to tolerate the additional complexities, delay, and possible confusion resulting from a side-battle over 1976 value (including the effect of the Arab oil embargo).

The MacKenzie Statement in Boucher's Presence

In January 1971 a KRC directors' meeting, attended by Boucher, considered a suit which had been threatened by COG to rescind the latter's Arctic purchase. At that meeting, Neil MacKenzie, a KRC official and head of its Calgary office, said, in answer to a query whether the price paid by COG for its Artic interest wasn't too high, that it was "ridiculous." Boucher admitted that he heard that remark and said nothing in response; his explanation (when the matter came up during his cross-examination) was that he "wasn't concentrating on this particular aspect at that time." MacKenzie's statement was admitted as an admission by silence on the part of Boucher,[13] and was used by the prosecutor to tell the jury that the price paid

13 MacKenzie was living in South Africa at the time of the trial and could only be produced, if at all, at great expense.

by COG was much too high and Boucher knew it. This is said to be prejudicial error.

The acceptance of MacKenzie's remark as an admission by silence on the part of Boucher was not incorrect. The general rule is to look at the circumstances to see whether it was more reasonably probable that a man would answer the charge made against him than that he would not. *United States* v. *Flecha,* 539 F.2d 874, 877 (2d Cir. 1976). Here, Judge Frankel could reasonably conclude that that test was met, Boucher having full opportunity to justify and explain his silence. MacKenzie was a knowledgeable official of KRC; the meeting was called to discuss what KRC should do (*e.g.* settle) about the anticipated COG lawsuit; MacKenzie's comments were serious ones about a matter in which Boucher had been and was directly involved, and they had a plain bearing on the course KRC should take on the COG suit; Boucher did comment on certain of MacKenzie's other statements but not on the observation that the price was "ridiculous." We cannot say that the court exceeded its discretion in allowing the jury to have this information.[14]

Once admitted, such an admission-by-silence was not hearsay and could be taken as an admission by Boucher of his belief in the statement and its truth. *See* FED. R. EVID. 801(d)(2)(B). This was how it was used by the prosecutor in his argument. MacKenzie's view was not admitted or urged upon the jury as expert testimony; the Government, in suggesting that Boucher accepted MacKenzie's valuation, simply pointed out that in Boucher's own mind

14 We read *United States* v. *Lam Lek Chong,* 544 F.2d 58, 65 n.8 (2d Cir. 1976), as holding no more than that, in the very different circumstances of that case, the *Flecha* rule was not met.

MacKenzie was a good judge of the level of the price COG paid.[15]

The conclusion we have reached, after carefully examining all the issues presented by each appellant,[16] is that none of them, singly or in combination, calls for reversal of either of the convictions.

The judgment as to each appellant is affirmed.

15 King complains that MacKenzie's remark, although admitted only against Boucher, was improperly used against King as well in the Government's arguments to the jury. That summation, however, linked the remark to Boucher alone, and King's counsel had the opportunity to point out in his answering summation that King was not present or bound by MacKenzie's statement.

16 Although appellants, who are Denver-based, have made scattered reflections on the difficulties and unfairness of trial in New York, they have not raised in this court (though they did below) the refusal of the District Court to transfer the case to Denver or the due process unfairness of requiring them to stand trial in New York. If the case had been transferred to Denver it is almost certain that it would have had to be moved again because of intense publicity there.

Appendix B — Relevant Constitutional Provisions, Statutes, and Rules

AMENDENT V — CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liability, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Appendix B — Relevant Constitutional Provisions, Statutes, and Rules

15 U.S.C. 78j(b) Manipulative and deceptive devices

To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

18 U.S.C. 371 Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. 1341 Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit

or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places, in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

18 U.S.C. 1343 Fraud by wire, radio or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Federal Rule 403 — Exclusion of Relevant Evidence on grounds of Prejudice, Confusion, or Waste of Time

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.